ALAN CROWLEY, Bar No. 203438
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: acrowley@unioncounsel.net

Attorneys for Union/Petitioner UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

DFWS, INC., dba THE GUILD SAN JOSE, Employer, and UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5, Union/Petitioner.	No. 32-RC-248845 **PETITIONER UFCW LOCAL 5'S RESPONSE TO THE EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO AFFIRM THE HEARING OFFICER'S FINDINGS AND RECOMMENDATIONS TO OPEN AND COUNT DETERMINATIVE CHALLENGE BALLOTS**

I. THE BOARD SHOULD DENY THE GUILD'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AFFIRMING THE HEARING OFFICER'S FINDINGS AND RECOMMENDATIONS TO OPEN AND COUNT DETERMINATIVE CHALLENGED BALLOTS

Absent new authority or even novel arguments, the Guild San Jose ("Company" or "Guild") simply recycles arguments it raised below. The Company's first exception concerning the finding that Assistant Store Manager Jordan Jimenez is a statutory supervisor ignores Region 32's analysis that the Board cannot rely on the scope of the stipulation when an included position is a statutory supervisor. The Company does not challenge the Region's findings and conclusions that "the record establishes that Jimenez at least has the independent authority to

hire, suspend, and discipline unit employees. (Hearing Officer's Report and Recommendations on Challenges and Objections ("RRCO"), p. 8.)

The Board should dismiss, and possibly sanction the Company, for claiming that the Region 32 Director "grossly misapplied" and failed or refused to individually review all the testimony upholding the Hearing Officer's recommendations. (See Company's Exceptions, p. 2.) In her decision, the Regional Director wrote, "I have carefully reviewed the Hearing Officer's Report and the Employer's Brief," and "the record evidence before me falls well short of meeting the standard" to support the Company's exceptions to the Hearing Officer's Report. (See Regional Director's Decision, p. 2, and fn. 1.) In addition to having before her the 27-page Hearing Officer's Report on Challenges and Objections, and 14-page Company brief on exceptions, the Regional Director also had the Union's Brief in Opposition to the Company's Exceptions, which highlighted the evidence supporting the Hearing Officer's Recommendation and properly described the holdings in the cases that the Company misrepresented. Thus, there is no merit to the Company's speculation that the Regional Director did not carefully consider either the Company's Exceptions, the record evidence, or the Hearing Officer's Report and Recommendations. The Board should sanction and censure the Company for making baseless accusations.

The Company's second Exception to the findings that Floor Managers Takahata, Palacios, and Gonzales are not statutory supervisors, is as meritless the third time around as it was the first two times it was raised. The Company again implores the Board to credit the testimony of the Company's President, Dana Anderson over the testimony of numerous other witnesses and evidence. The Company again cites to *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972), although it was easily distinguished below, and the Company continues to ignore the Hearing Officer's Findings that the testimony of the Company's General Manager/President Dana Anderson was internally inconsistent and lacked specificity. The Company admits that the Regional Director applied the proper standard that a Hearing Officer's credibility findings and proceedings of this type should only be reversed "when the

preponderance of all the relevant evidence convinces [the lower] that the [Hearing Officer's] resolution is incorrect. (*Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).) The Regional Director properly found that the record evidence before her fell well short of meeting the standard, and nothing in the Company's Exceptions to the Board should undercut that analysis.

For these reasons, as will be explained in more detail below, the Board should easily reject the Company's Exceptions. The Region should be allowed to certify Petitioner, given that the opened challenge ballots resulted in Petitioner winning the election 10-6.

II. ARGUMENTS

A. THERE IS NO MERIT TO THE COMPANY'S CLAIM THAT JORDAN JIMENEZ, WHO WAS FOUND TO BE A STATUTORY SUPERVISOR

In these Exceptions, as in the Exceptions filed to the Hearing Officer's Recommendations, the Company does not even challenge the Hearing Officer's findings that Jordon Jimenez is a statutory supervisor: "The record establishes that Jimenez at least has the independent authority to hire, suspend, and discipline Union employees." (RRCO, p. 8.) The Company simply raises the same argument it made below, that because the Stipulated Election Agreement includes the Assistant Store Manager position, it was improper for the Board to examine the supervisory status of Mr. Jimenez. However, here as in the Exceptions to the Hearing Officer's Report, the Company does not undercut the Hearing Officer's analysis.

The Regional Director reviewed the Hearing Officer's analysis of the Company's arguments, wherein the Hearing Officer concluded, "the fact that the Union may have agreed to the inclusion of [a particular employee] in the unit cannot result in nullification of the statutory exclusion of supervisors from the definition of 'employee' contained in the Act." (RRCO, p. 9, citing various cases.) The Regional Director agreed with the Hearing Officer's recommendation distinguished when a Stipulated Election Agreement inappropriately includes employees found to be statutory supervisors, or other excluded employees from coverage under the Act. (See RRCO, p. 9 quoting *The Tribune Company*, 190 NLRB 398 (1971).)

Thus, the Regional Director did not fail to consider the Stipulated Election Agreement. Rather, the Regional Director agreed with the Hearing Officer's analysis that well-established Board law precludes counting the vote of a statutory supervisor even if that statutory supervisor's title is included in a Stipulated Election Agreement.

B. THERE IS NO MERIT TO THE COMPANY'S EXCEPTION THAT THE REGIONAL DIRECTOR COMMITTED ERROR IN ADOPTING THE HEARING OFFICER'S CONCLUSION THAT FLOOR MANAGERS TAKAHATA, PALACIOS, AND GONZALES ARE NOT STATUTORY SUPERVISORS.

The Company argues again that the Hearing Officer, and apparently the Regional Director, should have credited the testimony of the Company's President Dana Anderson over the testimony of other witnesses. The Regional Director's decision indicates that she considered this exception, wherein below the Company argued as well that the Hearing Officer erred in making credibility determinations and findings of fact, particularly with regard to the credited testimony of Floor Managers Palacios and Takahata over General Manager Anderson. The Regional Director found the arguments raised by the Company in its exceptions, fell far short of the standard that a Hearing Officer's credibility findings and proceedings should only be reversed "when the clear preponderance of all the relevant evidence convinces [the Board] that the [Hearing Officer's] resolution is incorrect." (*Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).) Indeed, the Regional Director even cited to the Board's recent denial of the Employer's request for review in *Bloomsburg Care & Rehabilitation Center*, citing Board Order in 06-RC-241173, 2019 WL 7584379 (December 3, 2019), citing *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 130-136 (3d Cir. 2017) and *NLRB v. Attleboro Associates*, 176 F.3d 154, 164-166 (3d Cir, 1999).

Since the Company essentially recycled its exceptions to the Hearing Officer's Report into these exceptions to the Regional Director's Decision, Petitioner's response to the Company's claim that Company President Ms. Anderson allegedly "gave" the Floor Managers authority to discipline, sign, and responsibly direct employees is as described to the Region below:

The Company misunderstands Board precedent in claiming that Ms. Anderson allegedly "gave" the Floor Managers authority to discipline, assign, and responsibly direct employees. The Company mistakenly relies on *National Labor Relations Board v. Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972), which actually found that, "at the NLRB hearing, there was uncontroverted testimony by a company executive that the dispatchers had the authority to send a driver home if improperly dressed, or he refused to operate a certain bus or take a particular charter. Existence of such authority constitutes the power to suspend, thereby qualifying the dispatcher as a "supervisor" within the meaning of section 2(11)." (*Gray Line Tours, Inc.*, 461 F.2d at 764 (emphasis added).) In contrast, the RRCO in this matter is replete with admissions from Ms. Anderson that she did not know whether the Floor Managers actually had the authority to discipline, assign, or responsibly direct employees. The RRCO is well supported by the case law and facts, finding that the Floor Managers did not have true independence or discretion to assign work, discipline, or responsibly direct employees.

1. The Regional Director and the Hearing Officer Properly Found That The Company Failed To Demonstrate That The Floor Managers Held The Authority To Independently Issue Employee Discipline Within The Meaning Of Section 2(11).

The Company claims the Regional Director and the Hearing Officer should have relied on the testimony of President Dana Anderson instead of the testimony of Floor Managers Takahata and Palacios. However, the Hearing Officer found, "Ms. Anderson largely failed to testify with specificity. In one telling exchange on direct examination, Anderson stated that since she has been involved with the Company since September 2018 it was her 'assumption' that the Floor Managers were handling various tasks, including being 'responsible to make sure that the employee is there, and if they're not doing what they're supposed to be doing, then that floor manager is to make the decision on how they're going to handle the situation.'" (RRCO, p. 14 citing to Tr. 85:3, 15-18.) The Hearing Officer also noted, "the Employer failed to introduce any documentary evidence of the contested Floor Managers' issuance of discipline." (RRCO, p. 16.) The Hearing Officer also relied upon the Company's failure to have the

Company's second in command testify, Mr. Bennett Shatz, who is the managing agent directly interacting with the Floor Managers. Thus the Hearing Officer inferred that had Mr. Shatz testified he would have corroborated the testimony of Takahata and Palacios regarding the "lack of independent authority in relation to the issued write-ups." (RRCO, p. 16.) Contrary to the Company's contentions, Ms. Anderson's testimony was disputed, internally inconsistent, vague, confused, and not corroborated by witnesses or documents.

Additionally, as stated above, the Company's reliance on *Gray Line Tours, Inc.*, 461 F.2d at 764, is misplaced, as the court in *Grey Lines* found "uncontroverted testimony" that the dispatchers had the authority to suspend employees for numerous situations, thus affecting their take home pay. In contrast, the Hearing Officer in this case found that the disciplinary notices allegedly signed by Floor Manager Nicole Gonzales did not impact job status or tenure or wages. (RRCO, p. 14-15.) The Hearing Officer found, "the record is silent on the true impact or meaning of the write-ups that Anderson, Contreras, Drake, Takahata and Palacios testified about. There is no discussion of the Company's disciplinary policies or procedures; whether there is a progressive disciplinary system in place; or whether the write-ups may or may not lead to further discipline or other consequences." (RRCO, p. 15.) Ultimately, the Hearing Officer determined that the Company failed to meet its burden of demonstrating "that the write-ups constitute true personnel actions that may impact job status or tenure." (*Id.*, at 15.) The Hearing Officer's Report is amply supported by Board precedent that "the authority to issue warnings which do not affect the employee's status or contain recommendations for discipline are not evidence of supervisory authority." (*Id.*)

Similarly, there is no merit to the Company's assertion that Mr. Shatz's role was "purely to serve as a messenger" and that Ms. Gonzales' delivery of a written warning to Ms. Contreras somehow makes her a statutory supervisor. (Company Brief, p. 4.) The Hearing Officer found both Yesenia Contreras and Jarid Drake admitted there was "no evidence that the write-up somehow impacted" their job status or tenure. (RRCO, p. 15.) The mere issuance of a write-up, without evidence that the employees has the independent discretion to give the write-up, and

without evidence about how the write-up fit into a progressive disciplinary process, is insufficient to confer supervisory status on these Floor Managers. (See RRCO, p. 15, and cases cited therein.)

In summation, the Regional Director and the Hearing Officer did not err in finding that the Floor Managers did not have the authority to independently issue employees discipline within the meaning of Section 2(11).

2. The Regional Director and The Hearing Officer Properly Determined The Floor Managers Do Not Have The Authority To Assign Or Responsibly Direct The Employees Within The Meaning Of Section 2(11) Of The Act.

The Company continues to question the Regional Director and the Hearing Officer's conclusions that Ms. Anderson's testimony was too vague and it challenges the Hearing Officer's reliance on the testimony of other witnesses to find that the Floor Managers did not have the authority to responsibly assign or direct employees. The Hearing Officer's Report carefully reviews the testimony of all the witnesses and examines what is required in scheduling breaks, assigning overtime, and directing work under the Act.

There is no merit to the Company's claim that it was simply the Floor Manager's "managerial style" to not direct the employees. Contrasting the testimony of Ms. Anderson and the other witnesses, the Hearing Officer concluded that, "the Floor Managers' involvement in scheduling breaks is circumscribed and largely informed by employee preference and the obvious needs of the floor, the assignment is merely routine and is insufficient to demonstrate supervisory authority." (RRCO, p. 11.) Similarly, the Hearing Officer noted, "even by Ms. Anderson's own account, the Floor Managers may only 'request' an employee to stay longer or to otherwise canvas for persons to cover an open shift. Again, the power to direct in this regard appears circumscribed and to fall into the routine." (RRCO, p. 12.) The Hearing Officer, relying on Board precedent, determined that the reassignment of persons from one overstaffed area to another area is "mere equalization of workloads," and it does not require independent judgment. (*Id.*)

The Hearing Officer examined the combined testimony of the Company witnesses Yesenia Contreras and Jarid Drake to conclude "that the retail floor was a collaborative workspace in which the Floor Managers may have sought help but did not order it." (RRCO, p. 12, fn. 8.) The Hearing Officer concluded that the ability of Floor Managers "to request the 'sporadic rotation of different tasks' to be handled by the Budtenders or receptionists on a voluntary or consensus basis. This, again, is insufficient to demonstrate independent assignment or direction." (RRCO, p. 13.)

The Company makes much of Ms. Anderson's testimony that she believes the Floor Managers can assign overtime independently and without prior approval. The Hearing Officer determined that, "the Employer has failed to demonstrate that the Floor Managers have true independence to assign overtime. Ms. Anderson's testimony on the point was internally inconsistent and vague." (RRCO, p. 13.) Even crediting Ms. Anderson's testimony, despite it being contradicted by other witnesses, the Hearing Officer found that her testimony "at most shows that the Floor Managers may grant overtime within a circumscribed window that is not 'excessive,' as determined by her, her partner or Mr. Shatz." Thus, even crediting Ms. Anderson's testimony, a Hearing Officer properly concluded that the Floor Managers did not have true independence to assign overtime. (*Id.*) The Hearing Officer also noted that the Company failed to call Mr. Shatz either in its case and chief or as a rebuttal witness, which was particularly telling given that he would have been "best situated" to testify about Floor Managers' authority to approve overtime for others and about specific instances thereof." (RRCO, p. 13, fn. 9.)

Accordingly, the Hearing Officer did not err in concluding that the Floor Managers did not have the authority within the meaning of the Act to assign or responsibly direct employees.

3. There Is No Merit To The Company's Claim That Secondary Indicia Demonstrates That The Floor Managers Are Statutory Supervisors.

Since the Regional Director and the Hearing Officer properly concluded that none of the Section 2(11) indicia of supervisory status were present for the Floor Managers, secondary

indicia is not relevant. (See for example, *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002). The Company's claim that Ms. Contreras and Mr. Drake "perceived" the Floor Managers to possess supervisory authority is irrelevant when the record evidence establishes that the Floor Managers do not actually have independent authority.

The Company mistakenly claims that employees who are responsible for reconciling the cash box at the end of each shift are supervisors. First, this was not an argument raised below, thus it cannot be raised for the first time on exceptions. Second, many types of employees reconcile cash at the end of the shift, such as waitresses and cashiers and they are obviously not considered statutory supervisors on that basis. Third, the Company's reliance on *National Labor Relations Board* v. *Missouri Red Quarries, Inc.*, 853 F.3d 920 (8th Cir. 2017) is misplaced. In the *Missouri Red Quarries* case, the court relied on the secondary indicia to find an employee was a supervisor because a company would not run a 400-acre quarry without onsite supervision. Nor would it rely upon one supervisor several hundred miles away to supervise the quarry and another 100 employees at a different location. (*Id.*, at 928-929.) Since the Hearing Officer found that the Company's operations in this case are overseen by Dana Anderson, an unnamed partner, Bennett Shatz, and Assistant Store Manager Jordon Jimenez, who combined only oversee 4 Floor Managers, 13 Budtenders, 3 Receptionists, and 2 Cultivator/Inventory employees, the operations of The Guild are far more tightly supervised than the quarry in *Missouri Red Quarries*.

Accordingly, there is no merit to the Company's argument that secondary indicia supports finding that the Floor Managers are statutory supervisors.

/////

/////

/////

/////

III. CONCLUSION

The Board should deny the Company's exceptions to the Regional Director's Decision. The Board should find that the Regional Director properly adopted the Hearing Officer's 27-page Report and Recommendations on Challenges and Objections, and that the Regional Director properly ordered that the remaining ballots be counted. Accordingly, the Board should order the Region to certify the Petitioner as the representative of the employees of the Company.

Dated: February 6, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: ALAN CROWLEY

Attorneys for Union/Petitioner UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On the date below, I served upon the following parties in this action:

Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

Mr. Richard McPalmer, Field Attorney
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
richard.mcpalmer@nlrb.gov

Robert Carrol
Shelby Cummings
Arent Fox LLP
55 2nd St., 21st Fl.
San Francisco, CA 94105
robert.carrol@arentfox.com;
shelby.cummings@arentfox.com

copies of the document(s) described as:

PETITIONER UFCW LOCAL 5'S RESPONSE TO THE EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO AFFIRM THE HEARING OFFICER'S FINDINGS AND RECOMMENDATIONS TO OPEN AND COUNT DETERMINATIVE CHALLENGE BALLOTS

[X] BY ELECTRONIC SERVICE I caused to be transmitted each document listed herein via electronic service.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 6, 2020.

M. Carrell